his principal for the profit made, *i.e.* even if $50,000 was paid towards liquidating the debt owed by PW6 to Robert Wee. His counsel submitted that this was done through PW17 as the medium through whom this payment was made and that the latter's evidence of a short-term loan to him by the appellant of the *exact* amount of the profits bristles with doubts. As Mr. Kempster pointed out, if emphasis was to be placed at all on any lack of documents, no documentary evidence was produced to support Dr. Liow's evidence that he had repaid in full the monies due to the appellant on this alleged short-term loan.

It seems to me therefore that with or without PW6's connivance and/or complicity in the scheme to make a profit, the charge of criminal breach of trust with an appropriate amendment to conform with my findings was proved beyond reasonable doubt.

I might add that, at the conclusion of the hearing on November 17th last, I had no doubt that the conviction on this charge with an appropriate amendment was well-founded, notwithstanding the criticisms relating to PW6 and PW17.

The appeal against this conviction is accordingly dismissed.

Order: Convictions on first four charges quashed and sentences set aside.

Conviction on 5th charge of criminal breach of trust sustained.

Sentence: Imprisonment of 15 months plus such number of days as will enable the accused to be released today.

Order accordingly.

Solicitors: *Chor Pee & Hin Hiong.*

INDO-AUSTRALIAN TRADING CO. LTD. v. KRISHNASAMY

[O.C.J. (Choor Singh J.) February 29, 1972]

[Singapore — Suit No. 366 of 1967]

Landlord and Tenant — Claim for possession on ground that tenant had sublet premises and received rent in excess of recoverable rent — Whether persons subtenants or licensees — Control of Rent Act (Cap. 266), s. 15(1).

In this case the plaintiffs claimed possession of certain premises from the defendant. The premises had been let to the defendant and it was alleged that the defendant had sublet portions of the premises to a number of persons and had received rent in excess of the recoverable rent. The defendant alleged that the persons were licensees and not subtenants. He produced agreements entered into between him and those persons which described the parties as licensee and licensor but which otherwise were in the standard form of tenancy agreements.

Held: the true relationship between the parties as revealed by the substance of the agreements, the conduct of the parties and all the surrounding circumstances was that of landlord and tenant and not that of licensor and licensee and therefore the plaintiffs were entitled to possession of the premises as against the defendant and to rent and mesne profits.

Cases referred to:-

(1) *Mancroft Wagons Ltd.* v. *Smith* [1951] 2 K.B. 496.

(2) *Facchini* v. *Bryson* [1952] 1 T.L.R. 1386.

(3) *Addiscombe Garden Estates Ltd.* v. *Crabbe & Ors.* [1957] 3 All E.R. 563.

(4) *Abdul Rahim* v. *British and Malayan Trustees Ltd.* [1967] 1 M.L.J. 118.

CIVIL SUIT.

Peter Williams for the plaintiffs.

L. A. J. Smith for the defendant.

Cur. Adv. Vult.

Choor Singh J.: The plaintiff company is the owner of shophouse No. 100 Serangoon Road, Singapore, and it claims from the defendant possession of the said premises which is let to him on a monthly tenancy at a rent of $115 per mensem.

The plaintiff company bought the premises in question in July 1966 and at that time the defendant was already the tenant of the premises. After purchasing the premises the plaintiff accepted the defendant as its tenant. The defendant was then occupying the back portion of the ground floor. The front portion of the ground floor was divided into two sections with a passage in between the two sections. The area on the left of the passage was occupied by one S. V. Bhargavan, a watchmaker, who paid the defendant $80 per month. The area on the right of the passage-way was occupied by one Pranilal, a textile dealer, who paid the defendant $170 per mensem. The first floor of the premises was occupied by a Chinese named Wan Nam who paid the defendant $50 per mensem. Wan Nam paid for the water and light charges in respect of the first floor. The defendant paid for all the water and light charges in respect of the ground floor and these according to him varied between $110 and $130 per mensem.

On the 28th September 1966 the plaintiff company, through its solicitors, gave the defendant notice to quit which expired on the 31st October 1966. The defendant refused to vacate the premises and on the 6th March 1967, the plaintiff company issued the writ in these proceedings claiming possession of the premises from the defendant, the sum of $460 being four months rent in respect of the months July to October 1966 and mesne profits.

The premises come within the purview of the Control of Rent Act and the defendant claims the protection of the said Act. The plaintiff company relies on paragraph (g) of section 15(1) of the said Act which reads as follows: —

"15—(1) In the case of all premises such an order or judgment as is referred to in section 14 of this Act may be made in any of the following cases, namely: —

(g) where the tenant having sublet the premises or part thereof receives in respect of that subletting, rents (excluding any municipal services paid by the tenant) for any sublet part of the premises in excess of the recoverable rent for that part, or rents which exceed in the aggregate one hundred and ten per cent of the recoverable rent paid by the tenant himself including the apportioned rental or value of any part of the premises retained by the tenant or not sublet by him."

The defendant's case is that Bhargavan and Pranilal were both licensees and not sub-tenants and that the monthly sums received from them were licence fees and not rents. Agreements made between the defendant and Bhargavan (Exhibits P2, P3 and D3) and between the defendant and Pranilal (Exhibit D2) have been produced. As regards Wan Nam who occupied the first floor, the defendant admits that he was a sub-tenant who paid $50 per mensem as rent.

In the case of Bhargavan, he came on the premises in January 1958 by virtue of the agreement dated 16th January 1958 (Exhibit P2). Under this agreement he paid a deposit of $2,000 and was granted a licence to occupy a space 16 ft. by 5 ft. on the north side of the ground floor. He was to pay a licence fee of $80 per mensem. The agreement was for a term of three years commencing the 15th January 1958. On the 14th day of January 1961 a new agreement (Exhibit D3) was entered into between the defendant and Bhargavan under which a deposit of $2,000 was paid for the same space on the north side of the ground floor. A licence fee of $80 per mensem was to be paid and this agreement was for a term of one year commencing the 15th January 1961. On the 30th day of December 1961 a third agreement (Exhibit P3) was entered into between the defendant and Bhargavan. Under this agreement a deposit of $6,000 was paid for the same space on the north side of the ground floor and the licence fee was to be $80 per mensem. This agreement was for a term of five years. Bhargavan is said to have left the premises on the expiry of this agreement.

In the case of Pranilal, the agreement was entered between his wife Madam Umiyaben Pranilal and defendant. It is dated the 16th August 1963 (Exhibit D2). Under this agreement a sum of $6,000 was paid as deposit for the use and occupation of the left half portion of the ground floor measuring 9 ft. by 30 ft. A licence fee of $170 per mensem was to be paid and the agreement was for a period of five years.

It is clear that at the date of the determination of the tenancy, *i.e.* on the 31st October 1966, the defendant was in receipt of a total sum of $300 per mensem from three persons who occupied separate and distinct portions of the premises, namely Bhargavan and Pranilal who occupied portions on the ground floor and Wan Nam who occupied the first floor of the premises. The defendant paid a rent of $115 per mensem and paid the monthly consolidated bill which he says varied between $110 and $130 per mensem. The defendant occupied the whole of the rear portion of the ground floor where he and his brother's family lived. His brother had seven children which means that there were ten of them using the rear portion of the building as a dwelling and consequently a considerable portion of the water and light used on the ground floor was on their account. Under the circumstances it is clear that if Bhargavan and Pranilal were sub-tenants, as claimed by the plaintiff company, and paying rents for the portions of the ground floor occupied by them, then the plaintiff company must succeed in its claim for possession because on that basis the defendant was receiving rents which exceeded in the aggregate one hundred and ten per cent of the rent paid by him to his landlord and consequently was in breach of section 15(1)(g) of the Act. On the other hand if Bhargavan and Pranilal were not sub-tenants but mere licensees and paid not rent but licence fees, then the plaintiff's claim for possession of the premises must fail.

It is often a matter of great difficulty to determine whether a transaction creates a licence or a tenancy and the Control of Rent Act has greatly increased the importance of the distinction. The existence of a right to the exclusive possession of the property is no longer conclusive in favour of a tenancy for the courts have now evolved a new type of licence — "a permissive occupation falling short of a tenancy" which confers the right to exclusive possession of the premises and indeed has most of the attributes of a tenancy yet lacks "the estate in land which is a necessary incident to a tenancy". See *Mancroft Wagons Ltd.* v. *Smith.*[1]

The principles applicable in resolving the question whether a transaction has created a tenancy or a licence have been discussed in many cases. In *Facchini* v. *Bryson,*[2] Lord Justice Denning said, at page 1389: —

> "We have had many cases lately where an occupier has been held to be a licensee and not a tenant. In addition to those which I have mentioned in *Errington* v. *Errington,* [1952] 1 The Times L.R. 231, we have recently had three more. *Gorham (Contractors) Ltd.* v. *Field,* (Unreported), *Forman* v. *Rudd,* (Unreported) and *Cobb* v. *Lane,* [1952] 1 The Times L.R. 1037. In all the cases where an occupier has been held to be a licensee there has been something in the circumstances, such as a family arrangement, an act of friendship or generosity, or such like, to negative any intention to create a tenancy. In such circumstances it would be obviously unjust to saddle the owner with a tenancy, with all the momentous consequences that that entails nowadays, when there was no intention to create a tenancy at all. In the present case, however, there are no special circumstances. It is a simple case where the employer let a man into occupation of a house in consequence of his employment at a weekly sum payable by him. The occupation has all the features of a service tenancy, and the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label which they choose to put on it: *Commissioners of Customs and Excise* v. *Pools Finance,* [1952] 1 The Times L.R. 797. It is not necessary to go so far as to find the document a sham. It is simply a matter of finding the true relationship of the parties. It is most important that we should adhere to this principle, or else we might find all landlords granting licences and not tenancies, and we should make a hole in the Rent Acts through which could be driven — I will not in these days say a coach and four — but an articulated vehicle.
>
> In this case the document was not a licence but a service tenancy. It contains words saying that it is not a tenancy, but they must be ignored. The landlord is not entitled to possession except in accordance with the Rent Acts."

In *Addiscombe Garden Estates, Ltd.* v. *Crabbe & Ors.,*[3] Jenkins L.J., said at page 565: —

> "The principles applicable in resolving a question of this sort are, I apprehend, these. It does not necessarily follow that a document described as a licence is, merely on that account, to be regarded as amounting only to a licence in law. The whole of the document must be looked at; and if, after it has been examined, the right conclusion appears to be that, whatever label may have been attached to it, it in fact conferred and imposed on the grantee in substance the rights and obligations of a tenant, and on the grantor in substance the rights and obligations of a landlord, then it must be given the appropriate effect, that is to say, it must be treated as a tenancy agreement as distinct from a mere licence."

In *Abdul Rahim* v. *British and Malayan Trustees Ltd.*,[4] Chua J. in delivering the judgment of the Court of Appeal said, at page 119: —

"It is clear from the authorities that in determining whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee, the intention of the parties is the paramount consideration. The intention of the parties must be sought not from the mere words of the agreement but from the substance and from the conduct of the parties and the surrounding circumstances. As Denning L.J. said in *Crabb* v. *Lane*, [1952] 1 All E.R. 1199, at p. 1202:—

'The question in all these cases is one of intention. Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land.'"

In the present case, apart from the description of the parties as "licensor" and "licensee", I am unable to find any particular feature in the agreements entered into between the defendant and Bhargavan and in that between the defendant and Pranilal which would support the claim that the said transactions created in each case a licence and not a tenancy. All the agreements referred to are in the standard form of a tenancy agreement. The area to be occupied by the so-called licensor was in each case well defined. Both Bhargavan and Pranilal had exclusive possession of their respective areas. Each of these areas was enclosed by cupboards, almeirahs and showcases, with a passage in between these two areas which led to the rear portion of the ground floor. Bhargavan's agreement of the 30th December 1961 provided, in clause 4(d), that Bhargavan agreed "at the expiration of the said period of five years or sooner determination of this licence peacefully to vacate and deliver up to the tenant vacant possession of the licensed site". Again, by clause 4(f) Bhargavan undertook "not to assign the benefit of this agreement nor to part with the possession of the whole of the licensed site or any part thereof and not to permit anyone to share the occupation or use thereof without the prior written consent of the tenant". By clause 5(c) the defendant agreed "That the licensee paying the said charges and observing the performing all his obligations under this agreement may quietly enjoy the licensed site without any interruption by the tenant or by anyone claiming under or in trust for him". Under clause 6(i) there was a covenant for re-entry by the defendant if Bhargavan committed any breach of his obligations under the agreement. Like wise, in the agreement with Pranilal, clause 2(b) provided that Pranilal would "quit" and deliver up possession of the licensed portion of the premises to the licensor at the expiration of the period aforesaid". And by clause 2(d) Pranilal undertook "not to part with the possession or occupation of the licensed portion of the premises or any part thereof". And clause (ii) of the proviso to paragraph 3 of the agreement provided that "the employees of the licensee shall be permitted to sleep in the licensed portion of the premises after closing hours of the licensee's business". Now, all these are covenants which are normally found in standard tenancy agreements. When all this evidence is considered with the fact that a large sum of money was paid by both Bhargavan and Pranilal as a deposit and that the agreements were for five years, I do not think any court could on such evidence come to the conclusion that the transaction between the defendant and Bhargavan and that between the defendant and Pranilal created in each case a licence and not a tenancy. In my opinion the true relationship between the parties as revealed by the substance of the agreements, the conduct of the parties and all the surrounding circumstances, was that of landlord and tenant and not that of a licensor and licensee.

Counsel for the defendant submits that this was a common business arrangement in that both Bhargavan and Pranilal were permitted to do business on the premises during normal business hours and this arrangement did not "create an estate in land which is a necessary incident to a tenancy". I am unable to accept this submission. The exclusive occupation of well defined areas on the ground floor of the premises together with binding covenants for quiet enjoyment and re-entry, payment of large sums as a deposit and the long period of five years during which the arrangement was to hold good, all point to a tenancy. The evidence is entirely in one direction. As observed by Lord Justice Denning in *Facchini* v. *Bryson, supra*, "the relationship of the parties is to be determined by the law and not by the label they choose to put on it". On the evidence in this case I have no hesitation in holding that Bhargavan and Pranilal were both sub-tenants of the defendant and not mere licensees.

As Bhargavan and Pranilal were both sub-tenants, the defendant was collecting from them monthly sums as rents and not licence fees. Accordingly, as explained earlier, the plaintiff's claim for possession based on paragraph (g) of section 15(1) of the Control of Rent Act succeeds because the defendant was, at the date of the determination of the tenancy, receiving rents which exceeded in the aggregate one hundred and ten per cent of the rent which he paid to his landlord. The defendant having contravened section 15(1)(g) of the Ordinance the plaintiff company is entitled to possession of the premises forthwith subject to the rights of the sub-tenants, if any, who are still on the premises.

The plaintiff's claim of $460 being rent of the premises from the 1st July 1966 to 31st October 1966 at the rate of $115 per mensem must also succeed because the evidence shows that the defendant has not paid rent for the four months July to October 1966. The plaintiff is accordingly entitled to judgment for $460.

I shall now deal with the plaintiff's claim for *mesne* profits. It is agreed by both parties that the defendant was the tenant of the plaintiff on a month to month tenancy. This tenancy was determined by notice to quit dated the 28th September 1966 calling upon the defendant to deliver up possession of the premises on 31st October 1966. The defendant failed to give up possession upon the expiry of the notice to quit. At the moment of the determination of the contractual tenancy, the defendant was not a person protected against deprivation of possession because he had contravened section 15(1)(g) of the Act and thus did not at that moment become a statutory tenant. I therefore hold that the defendant became a trespasser as from 1st November 1966 and is liable to pay

mesne profits to the plaintiff. The plaintiff is clearly entitled to the rents of the sub-tenants for the period of the holding over. The defendant became a trespasser as from 1st November 1966 and accordingly he must hand over to the plaintiff all rents that he has collected from the subtenants in respect of the period commencing 1st November 1966 up to the date of this judgment. He is entitled to keep all rents collected by him in respect of any period before 1st November 1966. In the absence of the parties coming to some agreement on the amount due in respect of *mesne* profits there shall be an enquiry before the Registrar who shall ascertain and certify the amount that has been collected by the defendant from the sub-tenants in respect of the period 1st November 1966 to date of this judgment. There shall be judgment for the plaintiff for the sum so certified by the Registrar less the amount which the defendant may have paid to the plaintiff by way of rent in respect of the same period.

Judgment for the plaintiff.

Solicitors: *Williams & Tennakoon; L. A. J. Smith.*

MALAYSIAN REPORTS

LAM YET HONG & ANOR. v. TAN HUI KHENG

[O.C.J. (B.T.H. Lee J.) January 9, 1971]

[Kuching — Civil Suit No. K98 of 1968]

Probate and Administration — Administration of estates — Chinese custom — Will — Whether rule against perpetuities applies in Sarawak — Posthumous adoption — Declaration of disinheritance — Succession on intestacy under Chinese custom — Limitation — Limitation Ordinance — Administration of Estate Ordinance (Cap. 80), s. 17.

The plaintiffs brought an action for a declaration (i) that clause 3 of the will and clause 1 of the codicil of Yeo Chiang Woo deceased were contrary to the rule against perpetuities and void for uncertainty and invalid at law and in equity; (ii) that the plaintiffs together with the other heirs at law are entitled to the distribution of the estate of the testator in accordance with section 17 of the Sarawak Administration of Estate Ordinance (Cap. 80).

The first plaintiff claimed that she was entitled to the estate as the widow of Yeo Jut Peng the son of the first widow of the testator. In clause 5 of his will the testator had declared that Yeo Jut Peng had no claim to his property or business. The second plaintiff claimed he was the adopted son of the first plaintiff. The issues before the court were *inter alia* (a) whether the rule against perpetuities applies to Sarawak and to properties in Sarawak; (b) whether the alleged adoption of the second plaintiff is valid; (c) whether the plaintiffs or either of them are heirs at law in the event of a partial intestacy.

Held: (1) the rule against perpetuities does not apply in Sarawak or to properties in Sarawak;

(2) there was no evidence to support the existence of an adoption as alleged by the second plaintiff;

(3) the first plaintiff was not entitled to any distributive share in the estate but was only entitled to maintenance; as the first plaintiff had no *locus standi* it followed that the claim of the second plaintiff must also fail.

Cases referred to:-

(1) *Tay Sok Ann* v. *Tay Sok Hiong* [1955] S.C.R. 17.

(2) *In re Estate of Arunasallam* [1947] S.C.R. 18.

(3) *Re Oosasang's Case* Kuching Civil Case No. C/115/60 (unreported).

(4) *Ting Ing Kee* v. *Teng Koh Eng* [1960] S.C.R. 61.

(5) *Chettiar* v. *Chettiar* [1935] A.C. 163.

(6) *Lam Kim Sang* v. *Cheang Kok Sang* [1929] S.S.L.R. 62.

(7) *Cunningham* v. *Foot* (1877-78) 3 App. Cas. 970.

(8) *Foo Sam Teck* v. *Probate Officer, Simanggang* [1960] S.C.R. 17.

(9) *Liaw* v. *Blikas* [1965] 2 M.L.J. 9.

CIVIL SUIT.

Daniell Tajem for the plaintiffs.

Patrick Tan for the defendant.

Cur. Adv. Vult.

B.T.H. Lee J.: This suit was brought by the plaintiffs and related to the estate of Yeo Chiang Woo otherwise known as Yeo Tiang Ewe (deceased) who died testate on 4th July, 1927 at Kuching with a will dated 29th June, 1927 and codicil dated 2nd July, 1927.

The original executors of the will were Tan Jee Moi (f) the first widow and Yeo Jut Hin (Heng) the